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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted], 78

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Appellants

—*v.*—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY MEMORANDUM FOR ATLANTIC CITY ELECTRIC CO., ET AL.

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Dated: May 7, 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1083

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Appellants

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees

REPLY MEMORANDUM FOR ATLANTIC CITY ELECTRIC CO., ET AL.

The memorandum for the United States, the Interstate Commerce Commission (hereinafter "ICC") and Secretary of Agriculture in Nos. 1283 and 1083 indicates a division between the United States and the Interstate Commerce Commission as to whether probable jurisdiction should be noted in No. 1083, *Atlantic City Electric Co. et al.* v. *U. S. et al.* The United States believes that probable jurisdiction should be noted in *Atlantic City*, while the ICC urges that probable jurisdiction be noted in *Alabama Power Co. et al.* v. *U. S. et al.* only.

The ICC, in supporting review in No. 1283 and opposing it in No. 1083, misconceives the nature of the issue before this Court, and does not recognize that the distinction between the position of these Appellants and Appellants in No. 1283 is not significant for the purpose of determining that issue.

Both *Alabama Power* and *Atlantic City Electric* are appeals from three-judge district court decisions denying plaintiff shippers the right to obtain judicial review of an ICC order and the procedures followed by the ICC in arriving at such order. It is true, of course, as the memorandum of the ICC notes, that in *Atlantic City Electric* the Appellants' "real grievance was with the higher returns on the particular commodities of interest to them" (pp. 4-5). However, the ICC is wrong, and in fact naive, in assuming that the "real grievance" of the Appellants in *Alabama Power* is any different. Both Appellants allege that the rate increases approved by the Commission are unlawful; both Appellants seek reversal of the ICC's order on the grounds that it lacks the required evidentiary support.

The cases differ because, in seeking review, Atlantic City and Alabama Power rely on different errors of the Commission.

Alabama Power, as correctly noted in the memorandum for the United States and the ICC, basically urges that there was insufficient evidence for the Commission to find that the railroads needed additional revenues.

Atlantic City Electric urges that the Commission erred in accepting the railroads' allocation of such revenue increments among shippers, even assuming, *arguendo*, that revenue needs existed, because:

(a) the railroads failed to meet their statutory burden of proof that resulting rates and charges to individual shippers would be just and reasonable;

(b) the railroads failed to bear their statutory burden of proof that the resulting rates would not cause a diminution of net revenues due to diversion of traffic from the railroads; and most importantly,

(c) regardless of the weight of evidence in the record, the Commission's order should be set aside because the

Commission erred by failing in its duty of affirmative regulation, taking no part in the proceedings except as an umpire, blandly calling balls and strikes between necessarily unequally matched litigants.

However, at this time the differences in the errors urged below are not significant: both courts below denied review of the Commission's order, basing their decisions solely on the *Algoma** doctrine, which the Appellants in No. 1083 and in No. 1283, together with Judge Skelly Wright in his dissent in *Alabama Power*, believe to be inapplicable.

The issue here is whether shippers may obtain judicial review of ICC orders of the type here complained of, namely, nationwide, across-the-board freight rate increases. Should this Court agree to decide that narrow issue, which we believe it should, it also can then decide whether the pleadings below properly raised such issue.

Respectfully submitted,

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* *Algoma Coal & Coke Co.* v. *U. S.*, 11 F. Supp. 487 (E.D.Va., 1935).

Certificate of Service

I, SHEILA H. MARSHALL, as attorney for Atlantic City Electric Company, et al., Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 7th day of May, 1970, I served copies of the foregoing Reply Memorandum on the following, all of whom were parties to the action in the court below, by first class mail, postage prepaid.

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/s/ SHEILA H. MARSHALL

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